85-978 (7)

NO._____

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

BEST AVAILABLE COPY

85 PP

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JOHN F. COLLINS, M.D., P.C.
430 West 35th Street
Davenport, Iowa 52806

Telephone 386-2455

April 29, 1985

To whom it may concern:

Mose Korey

This is to certify that Mose Korey is unable to proceed with a court action at the present time due to a recent stroke, which has affected his speech and his ability to get about. He also suffers from post irradiation treatment for a tumor.

Sincerely,

/s/
John f. Collins, M.D.
P.C.

JFC:k

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MOSE KOREY,	)	
	)	CIVIL NO.
Plaintiff,	)	83-174-D-1
	)	
vs.	)	RULING AND
	)	ORDER GRANTING
CITY OF DAVENPORT,	)	DEFENDANT'S
	)	MOTION FOR
Defendant.	)	SUMMARY
	)	JUDGMENT

The Court has before it defendant's motion for summary judgment which plaintiff has resisted. The Court finds that the motion is fully submitted and ready for ruling.

On October 21, 1983 plaintiff filed a civil rights action, pursuant to 42 U.S.C. Sections 1982, 1983, 1985 and 1986, alleging that defendant deprived him of real property, in derogation of his constitutional rights. Plaintiff's multiple alle-

gations arise from defendant's 1969 and 1980 condemnations of approximately twenty acres of plaintiff's real property, for park purposes. In 1972, plaintiff obtained a jury award in the amount of $33,020.00, plus attorney fees and costs, as the result of his state court action challenging the 1969 condemnation. In 1980, the condemnation commission awarded plaintiff $11,000 as compensation for land condemned in that year. Plaintiff brought various actions in state court from 1971 until 1982, attacking the 1969 condemnation proceeding on various grounds in each instance. On October 21, 1983, plaintiff filed a complaint in this Court requesting that the 1969 condemnation proceeding by the city be set aside and that

actual and punitive damages be awarded. On June 18, 1984 defendant filed a motion for summary judgment grounded on the statute of limitations and res judicata. Plaintiff, proceeding pro se, has vigorously resisted.

I. Plaintiff has not stated a claim upon which relief can be granted under 42 U.S.C. Section 1983.

1. Plaintiff asserts that defendant, acting under color of state law, deprived him of real property and affected his ability to engage in business as a truck farmer by reducing his acreage from twenty-seven acres to seven acres, through condemnation. See Parratt v. Taylor, 451 U.S. 527, 536, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Plaintiff's business as a truck farmer was affected indirectly by the said

condemnation, but an adverse effect indirectly resulting from valid governmental action is not protected by due process. Heille v. City of St. Paul, Minn., 671 F.2d 1134, 1137 (8th Cir. 1982). No "protected property right" has been infringed. Id.

2. Plaintiff has not been deprived of any "rights, privileges or immunities secured by the Constitution and its laws." Cahill v. Cedar County, Iowa, 367 F.Supp. 39, 45 (N.D. Iowa 1973). Iowa law, under which defendant exercised its right of eminent domain, affords a condemnee full procedural due process. In Iowa, a property owner has a constitutional right to a jury trial when his property is taken by eminent domain. Id.; Sigafoos v. Talbot, 25 Iowa 214 (1868). In Cahill,

plaintiffs attacked the state's failure to proceed under the general condemnation statute, Chapter 472, The Code, alleging that they were not afforded full due process when the state proceeded under Chapter 306, The Code. Id. Plaintiff received the benefits of Chapter 472, The Code, and exercised his right to trial by jury, recovering nearly twice the amount offered by the city. Plaintiff also recovered attorney fees and costs as required by state law. Plaintiff did not seek a jury trial or an appeal from the condemnation commission's 1980 compensation award. Plaintiff states no claim, under Section 1983 or Section 1982, for violation of due process or equal protection.

II. Claims accruing prior to October 21, 1978 are time barred.

Federal civil rights actions brought pursuant to 42 U.S.C., Sections 1983 and 1985 are subject to Iowa's five-year statute of limitations. Branchcraft v. Brewer, 683 F.2d 251 (8th Cir. 1982). The limitations period begins to run at the time of the alleged wrong. Chadon v. Fernandez, 454 U.S. 6, 8 (1981). Plaintiff's action accrued on June 9, 1969, by notice of condemnation.

III. Claims arising since October, 1978 have been adjudicated in the state court. The claims pertaining to floodings and drainage problems are not cognizable under civil rights statutes. Plaintiff's state remedies have been pursued and

exhausted. No further remedy is available in this court.

1. The 1980 condemnation involved the taking of a strip of plaintiff's land, adjacent to the 1969 land condemned, for purposes of constructing temporary and permanent drainage easements as part of the park project. Plaintiff did not challenge the compensation award received in 1980.

2. Plaintiff alleges that his privacy was invaded and that he has been harrassed and vandalized by reason of the proximity of a bikeepath, constructed by defendant on plaintiff's previously condemned property. Plaintiff's 1980 application to the state court to enjoin the city from entering and constructing the bikepath,

which was begun in 1973, was denied. Plaintiff then lost his action to quiet title in 1982. Plaintiff's appeal from the Court's adverse decision was dismissed.

3. Plaintiff's 1982 action for damages for the flooding of his crops and for an injunction to abate nuisance obstructing drainage from his own property was also dismissed by the state court in 1982. Plaintiff has been afforded, and has taken advantage of, state remedies on each cause of action that may have accrued since October 21, 1978, five years before the filing of his complaint.

Any remedy plaintiff had against the city for invasion of privacy and various allegations of discriminatory treatment appears to be time barred

under Iowa law Chapter 613A, the Code.

4. Plaintiff alleges that the city refused to allow him to farm or plant a garden, or carry away firewood from the condemned property while others were allowed to do so. The latter claim appears not to be viable in view of plaintiff's jurisdictional problems.

The Court finds that defendant's motion for summary judgment will be granted. Under the facts of this case, plaintiff has not been deprived of property in violation of his rights to due process and equal protection and has no cause of action in this court. Accordingly, there is no genuine issue of material fact and defendant is entitled to judgment as a matter of

law. Federal Rule of Civil Procedure 56.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment shall be, and hereby is, granted.

Signed this 12th day of April, 1985.

W.C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MOSE KOREY,	)	
	)	CIVIL NO.
Plaintiff,	)	83-174-D-1
	)	
vs.	)	ORDER DENYING
	)	MOTION TO
CITY OF DAVENPORT,	)	RECONSIDER
	)	
Defendant.	)	
	)	

The Court has before it plaintiff's letter dated May 2, 1985. Plaintiff expresses his feeling that the Court's Order granting summary judgment to defendant was unfair because the Order was entered after plaintiff had requested a stay of all proceedings due to health problems. Plaintiff's letter will be treated as a motion to reconsider the entry of judgment in favor of defendant.

Defendant's motion for summary judgment was filed on June 18, 1984.

Plaintiff was granted an extension of time until July 13, 1984, to respond to the motion. A further extension was granted until July 27, 1984. Plaintiff filed his resistance to the motion for summary judgment on July 27, 1984. The resistance was accompanied by a six-page memorandum in support thereof, a separate fourteen-page memorandum of points and authorities, a twenty-page affidavit of material facts, and twenty-nine exhibits. Defendant's subsequent request for oral argument was also resisted by plaintiff.

On November 30, 1984, plaintiff filed an application for a stay of six months due to health problems. This motion was not ruled on by the Court.

On April 12, 1985, having reviewed defendant's motion and plaintiff's re-

sistance both to the motion and to defendant's request for oral argument, the Court deemed the matter fully submitted and proceeded to rule on the motion for summary judgment. The Court's ruling will stand, and plaintiff's motion to reconsider will be denied. Plaintiff fully resisted defendant's motion and expressed his belief that oral argument was not necessary. A period of four months then passed before plaintiff requested a stay. At any time during that period, the Court could have considered the motion for summary judgment fully submitted and proceeded to rule thereon. If plaintiff desired to make further arguments, he had ample opportunity to do so before November 30. Plaintiff does not now state what additional arguments he

would have made, and the Court can conceive of none. Summary judgment in defendant's favor was clearly appropriate.

IT IS THEREFORE ORDERED that plaintiff's motion to reconsider is hereby denied.

Signed this 8 day of May, 1985.

W.C. STUART, JUDGE
SOUTHERN DISTRICT OF IOWA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

August 15, 1985

Mr. Mose Korey
3026 Belle Avenue
Davenport, IA 52803

Re: No. 85-1669-SI
Mose Korey vs. City of
Davenport, Iowa

Dear Mr. Korey:

Enclosed is a copy of an order entered by us today at the direction of the court.

Sincerely,

/s/
Michael E. Gans
Chief Deputy

MEG/cgj

Enclosure

cc: Patricia Rhodes Cepican
James R. Rosenbaum, Clerk,
U.S. District Court

FOR INFO ONLY:
Honorable William C. Stuart
(83-1274 D 1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1669

MOSE KOREY,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court
v.	*	for the Southern
	*	District of Iowa.
CITY OF DAVENPORT, IOWA,	*	
	*	
Appellee.	*	
	*	

Submitted: August 1, 1985

Filed: August 15, 1985

ORDER

Mose Korey appeals from an order of the district court granting summary judgment in favor of the City of Davenport, Iowa. After reviewing the record, we find that the district court committed no error

of law or fact. Accordingly, we conclude that the issues presented do not require further consideration. We affirm the district court. See 8th Cir. R. 12(a).

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

Mr. Mose Korey
3026 Belle Avenue
Davenport, Iowa 52803

Re: No. 85-1669-SI
Mose Korey v. City of
Davenport, Iowa.

Dear Sir:

Enclosed please find copy of order entered today at the direction of the Court.

Sincerely,

/s/
Linda L. Penberthy
Senior Deputy Clerk

rmh

Enclosure (1)

cc: Patricia Rhodes Cepican
James R. Rosenbaum, Clerk,
U.S. District Court
(83-174-D-1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1669-SI

MOSE KOREY,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
vs.	*	District Court
	*	for the Southern
CITY OF	*	District of Iowa
DAVENPORT, IOWA,	*	
	*	
Appellee.	*	
	*	

Appellant's petition for rehearing is denied by the Court on the basis of untimely filing.

September 19, 1985

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

October 3, 1985

Mr. James R. Rosenbaum, Clerk
U. S. District Court
200 U. S. Cthse.
Des Moines, IA 50309-2084

Re: No. 85-1669-SI
Mose Korey vs. City of
Davenport, IA
(83-174-D-1)

Dear Sir:

The mandate of this Court is enclosed together with a receipt therefore in the above case. We would appreciate it if you would sign, date and return the receipt to this office.

Returned are two volumes of original files.

Sincerely,

eh
Encl 3

ROBERT ST. VRAIN, CLERK
By E. Hoffman
Deputy Clerk

cc: Mose Korey
Patricia Rhodes Cepican

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

October 11, 1985

Mr. Mose Korey
3026 Belle Avenue
Davenport, Iowa 52803

Re: No. 85-1669-SI
Mose Korey v. City of
Davenport, Iowa.

Dear Mr. Korey:

Receipt is acknowledged of your motion to correct error. Petitions for rehearing must be filed within fourteen days of entry of judgment per FRAP 40. The three-day mailing privilege is not extended to petitions for rehearing, at least by this Circuit, and petitions that are untimely by even one day may be rejected by the Court. I wish to assure you, however, that the Court did view the content of your document and considered your comments.

The fact that your petition has been denied does not preclude you from proceeding with the case to the Supreme Court of the United States. You are

however urged to insure that your petition is timely filed with that Court.

Sincerely,

/s/
Linda L. Penberthy
Senior Deputy Clerk

LLP/rmh

Enclosure (1)

cc: Patricia Rhodes Cepican
James R. Rosenbaum, Clerk,
U. S. District Court.
(83-1274-D-1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

November 6, 1985

Mr. Mose Korey
3026 Belle Avenue
Davenport, Iowa 52803

Re: No. 85-1669SI
Mose Korey v. City of
Davenport, Iowa

Dear Mr. Korey:

The opinions and dispositive orders of this Court which are issued by the Clerk's office are all entered at the direction of a panel of judges after consideration of the record and any briefs or other pleadings which have been submitted by the parties. In your case, the entire original file of the United States District Court was obtained from the district court. The district court file and the pro se brief which you filed were sent to a panel of judges which considered your appeal. The panel consisted of Judges Donald Ross, Theodore McMillian and George Fagg. The Order of August 15, 1985 affirming the district court's action and the order of September 19, 1985 denying your petition for

rehearing were entered only after this office received directions from the three judges to issue those orders.

Because the Eighth Circuit Court of Appeals includes seven states and the judges are located throughout the seven states opinions and orders must be issued from a central source-the Clerk's office in St. Louis. Opinions and orders must be duplicated for distribution to the parties, the district court and the media. It is impractical to have these documents individually signed by each judge on the panel. The August 15 Order disposing of your appeal should have identified the members of the panel which considered your appeal. I apologize for that administrative oversight. Your case was properly handled by this office. The case was considered by and ruled on by a three judge panel and the appeal was officially concluded with the issuance of this Court's mandate on October 3, 1985.

Sincerely,

/s/
Robert St. Vrain
Clerk of Court

RStV/cg

IN THE DISTRICT COURT
OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

MOSE KOREY, Plaintiff,	IN EQUITY
VS.	NO. 51298
CITY OF DAVENPORT, IOWA Defendant.	NOTICE TO DEFENDANT OF ORDER TO SHOW CAUSE

TO: CITY OF DAVENPORT, IOWA
a municipal corporation

You are hereby notified that there is now on file in the office of the Clerk of the District Court of Scott County, Iowa, the petition and affidavit of the plaintiff in this action, alleging that "a landowner shall not be dispossessed, under condemnations proceedings, of his residence, dwelling house, outhouse, orchard or gardens, until the damages thereto have been finally determined

and paid", that plaintiff has not consented to the establishment of said park on his orchard or gardens and does not and will not consent thereto, and praying that a temporary injunction restraining the defendant from establishing a park thereon.

You are further notified that on the 9th day of June, A.D., 1969, upon reading the said petition and affidavit of the plaintiff and hearing the evidence in support thereof, the Honorable Nathan Grant, Judge of said Court, entered an Order and Decree that the defendant show cause before him as such Judge of said Court, at 2:30 o'clock P.M., on the 26th day of June, A.D., 1969, at the Court House in Davenport, Iowa, why an injunction should not be issued enjoining and

restraining you as the defendant in the case from condemning the real estate of the plaintiff and for such other and further relief with reference to said cause as may be just and equitable in the premises, and that in the meantime that you as the defendant be restrained and forbidden to commit or permit any of said acts until further Order of this Court.

You will therefore take due notice of such restraining Order to avoid the penalties of the law.

You will also take due notice that unless you appear and show cause at the above stated time and place, that your default will be entered and judgment and decree rendered as provided by law granting such relief, as prayed in said petition, as may be necessary in the

premises, and that a temporary injunction will issue as prayed to be in full force and effect until final hearing in this action.

Dated at Davenport, Scott County, Iowa, this 9th day of June, A.D., 1969.

Don A. Petruccelli
Attorney for Plaintiff
716 First National
Building
Davenport, Iowa 52801
Phone: 323-0874

IN THE DISTRICT COURT
OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

MOSE KOREY, Plaintiff, VS. CITY OF DAVENPORT, IOWA, Defendant.	ORDER FOR HEARING ON TEMPORARY INJUNCTION NO. 51298 IN EQUITY

Now, on this 9th day of June, A.D., 1969, it satisfactorily appearing from the petition of the plaintiff and the affidavit and evidence in support thereof, that sufficient grounds exist for the issuance of a temporary injunction as prayed:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant show cause before the undersigned Judge of this Court, at 2:30 o'clock A.M. on the 26th day of June, A.D., 1969, at the Court

House in Davenport, Iowa, why an injunction should not be issued enjoining and restraining the defendant from condemning the real estate as shown in Exhibit "A" attached to the petition and for such other and further relief with reference to the said cause as may be just and equitable in the premises.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the meantime, the defendant is hereby restrained and forbidden to commit or permit any or said acts until the further Order of this Court.

NATHAN GRANT, JUDGE
Seventh Judicial
District of Iowa

IN THE DISTRICT COURT
OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

MOSE KOREY,	)	
	)	ORDER FOR TEMPORARY
Plaintiff,	)	INJUNCTION
	)	
VS.	)	NO. 51298
	)	
CITY OF DAVENPORT, IOWA,	)	IN EQUITY
	)	
Defendant.	)	
	)	

Now, on this 9th day of June, A.D., 1969, it satisfactorily appearing from the petition of the plaintiff and the affidavit and evidence in support thereof, that sufficient grounds exist for the issuance of a temporary injunction as prayed:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant show cause before the undersigned Judge of this Court, at 2:30 o'clock P.M. on the 26th day of June, A.D., 1969, at the Court

House in Davenport, Iowa, why an injunction should not be issued enjoining and restraining the defendant from condemning the real estate as shown in Exhibit "A" attached to the petition and for such other and further relief with reference to the said cause as may be just and equitable in the premises.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the meantime, the defendant is hereby restrained and forbidden to commit or permit any or said acts until the further Order of this Court.

NATHAN GRANT, JUDGE
Seventh Judicial
District of Iowa

STATE OF IOWA)
):SS
SCOTT COUNTY)

I, William A. Strout, Sheriff of Scott County, Iowa do hereby certify that I received the attached Order for Temporary Injunction on June 9, 1969, and on said date I served personally City of Davenport, Iowa by serving Allyn Wiese, Clerk for the City, by giving and reading to him a true copy thereof. Said service being made in the City of Davenport, Scott County, Iowa.

William A. Strout, Sheriff
Scott County, Iowa

By Jim Alexander
Deputy Sheriff

Defendant's Answers to
Interrogatories, No. 2

1. State whether or not Defendant obtained prior written approval from the Secretary of Housing and Urban Development for conversion of open-space land to any other uses, such as water mains and sewer lines, as required by Title 42, United States Code, Section 1500c, and if so, state the date of such approval and a description of all documentation known to Defendant in connection with the application for such prior written approval and the written approval itself.

ANSWER: It is not believed that any prior written approval was obtained. By way of further answer, defendant states that the uses are consistent with the purposes of the Open Space Program and it is not altogether clear that prior written approval for such uses was or is required.

2. State whether or not Defendant was served a copy of Order for Temporary Injunction and Order for Hearing on Temporary Injunction, dated June 9, 1969, signed by Judge Nathan Grant, and state the date on which service was made upon Defendant and whether or not Defendant has a copy of said orders in its possession.

ANSWER: Defendant has no independent recollection that it was served or when it was served. Defendant does have a copy of the order issued June 9, 1969. The sheriff's return of service shown service on Allyn Wiese, City Clerk, on June 9, 1969. Defendant further states that no temporary injunction was ordered, issued, or served on June 9, 1969, or at any other time.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

ROBERT E. SHOEMAKER, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	CIVIL NO. 78-112-D
ROBERT PAPE, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	RULING AND ORDER CIVIL NO. 78-113-D

On December 27, 1979, the Court entered an Order reviewing several motions in the above-captioned cases initiated by property owners in Muscatine, Iowa against the City of Muscatine challenging the legality and constitutionality of the defendant's

condemnation of certain described property. The Court in that Order granted the plaintiffs' unresisted joint motion for consolidation, and the defendant's motion for summary judgment as to plaintiffs Shoemakers' and Papes' claims initiated under 42 U.S.C. Sections 1982 and 1985. In addition, the Court denied the defendant's motion as to the plaintiffs' claims initiated under 42 U.S.C. Section 1983, and ordered the plaintiffs to respond to the res judicata and abstention issues raised by the defendant. On January 28, 1980, the plaintiffs filed their responses and affidavits. The defendant on January 30, 1980 filed a brief in support of its summary judgment motion, and filed a supporting affidavit on February 22, 1980. The

plaintiffs filed a reply to this affidavit on March 3, 1980. The issues in question are now fully submitted.

As to the defendant's res judicata claims, the Court does not believe the plaintiffs' actions presently before the Court are barred because of the plaintiffs' initiation and litigation of claims in Iowa District Court pursuant to Chapter 472 of the Iowa Code. It is true that a party cannot avoid the effects of res judicata by failing to assert matters in the former litigation that were properly subject to litigation there. The rule is stated as follows:

> The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination

> of the questions involved in the prior action; the conclusiveness of the judgment in such a case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein.

46 Am. Jur. 2d Section 417.

The Court does not believe, however, that the issues raised in the above-captioned action could have been raised at the time their respective appeals were taken to the district court. When their appeals of their condemnation awards were initiated pursuant to Iowa Code Annotated Section 472.21 (Supp. 1979-80), the sole issue available for determination by the district court appeared to be the amount of damages owed by the condemnor. Iowa Code Annotated Section 472.23 (1971);

State ex rel. Iowa State Highway Commission v. Read, 228 N.W. 2d 199, 2[illegible] 975), appeal after remand 262 N.W. 2d 533 (1978); Stellingwerf v. Leninhan, 249 Iowa 689, 85 N.W. 2d 912, 915 (1957). See also Thornberry v. State Board of Regents, 186 N.W. 2d 154, 156-57 (1971). The constitutional claims asserted in this action could not have been raised by plaintiffs. The cases cited by defendant in support of its contention that res judicata bars the plaintiffs' federal actions are inapplicable here because in those cases the plaintiff either had or could have previously litigated a question or claim before coming into federal court. Therefore, the defendant's motion for summary judgment is denied.

The Court has remaining before it

for consideration the defendant's claim that the Court should invoke the doctrine of abstention. After careful consideration, the Court believes that it should not abstain from consideration of the plaintiffs' claims. See George v. Parratt, 602 F. 2d 818 (8th Cir. 1979).

As to the Papes' claims, there is no ongoing state action involving their claims which could eliminate or alter the constitutional issues before this Court. The Papes would have no state remedies available at this time to assert their claims if their federal action is dismissed. In addition, the Court does not believe that federal court disposition of Papes' claims would interfere with a comprehensive state policy. Burford v. Sun Oil Co., 319 U.S. 315 (1943). The legislature

of the State of Iowa has established the procedure in Chapter 472 to be followed by condemnees in challenging the amount of condemnation awards, but no such procedure has been created for challenges to the legality and constitutionality of the condemnor's actions. Therefore, disposition of Papes' claim shall proceed without interruption.

In addition, even though Shoemakers presently have an appeal pending before the Iowa Supreme Court of the Iowa district court's dismissal of Division IV of their state law complaint, the Court feels application of the doctrine of abstention would be inappropriate. The Court has already determined that consideration of the Papes' claims must proceed. Since the cases initiated by the Papes

and Shoemakers have been consolidated and raise substantially the same issues, it would not further the interests of judicial efficiency to split consideration of the cases between the federal and state judicial systems. Further, as was the case with the Papes' claims discussed above, the Court does not believe that federal court consideration of the Shoemakers' claims would interfere with a comprehensive state policy. Therefore, the Court does not believe it is justified in staying any further action on Shoemakers' claims.

This ruling will not preclude defendants from reasserting their motion for abstention, if the Iowa Supreme Court remands the issues in Division IV of Shoemaker to the

District Court of Iowa for trial upon the merits. Dismissal of the appeal could create additional res judicata issues not presently before the Court.

IT IS THEREFORE ORDERED that the defendant's Motion for Summary Judgment as to the plaintiffs' claims under 42 U.S.C. Section 1983 is hereby denied.

IT IS FURTHER ORDERED that the Court shall not stay further action on the plaintiffs claims initiated pursuant to 42 U.S.C. Section 1983.

Signed this 25 day of April, 1980.

W.C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

ROBERT E. SHOEMAKER, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	CIVIL NO. 78-112-D
ROBERT PAPE, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	CIVIL NO. 78-113-D

ORDER

This matter is before the Court pursuant to motions to strike jury demand and for summary judgment, filed by defendant on March 26, 1981 and resisted by the Shoemakers on April 1, 1981. The Papes' filed their resistance to both motions on May 26, 1981.

On May 26, 1981, defendant's motions came on for hearing before the Court. All plaintiffs by agreement were represented by Bruce Washburn and defendant by Patrick Ryan. Having carefully considered the file in the above-captioned case together with the arguments of counsel, and being otherwise fully advised in the premises, the Court enters the following Order.

This is a civil rights action initiated by Muscatine, Iowa property owners to contest the legality and constitutionality of the appropriation of certain described property pursuant to an urban renewal project. Specifically, plaintiffs allege that their property was wrongfully taken in the context of condemnation proceedings instituted under an urban renewal plan

premised on false and nonexistent factual findings purportedly derived in an arbitrary and capricious manner by the defendant's City Council. Chapter 403 of the Iowa Code requires the City to make particular findings of fact as part of the condemnation procedure prescribed by state urban renewal law. It is plaintiffs' contention that the acts of the City Council were perpetrated knowingly, willfully and in excess of its authority, with the intent to effect the confiscation of plaintiffs' property without due process of law in order to permit the utilization of such property by a private corporation for development.

I. Motion for Summary Judgment

Defendant moves for summary judgment on the grounds that plaintiffs'

claims under section 1983 are barred by the applicable state statute of limitations and through the operation of the doctrine of res judicata.

Federal Rule of Civil Procedure 56 in general provides that where the record discloses no genuine issue of material fact and where one of the parties is entitled to judgment as a matter of law, that party may move for and, if appropriate, obtain summary judgment. Once the movant supports his motion with matters outside the pleadings, the party opposing such motion cannot rest on the allegations of his complaint, but is required to come forward with evidentiary facts in resistance. Federal Rule of Civil Procedure 56(e). See Stovall v. City of St. Louis Board of Education,

614 F. 2d 619, 621 (8th Cir. 1980); Roberts v. Browning, 610 F. 2d 528, 536 (8th Cir. 1978). The Court must assess the facts in the light most favorable to the nonmovant, and the latter must be afforded the benefit of all favorable inferences which may be derived from the underlying facts as revealed in the pleadings, depositions and affidavits filed therein. McClain v. Meier, 612 F. 2d 349, 356 (8th Cir. 1979); EEOC v. Liberty Loan Corp., 584 F. 2d 853, 857 (8th Cir. 1978).

A. Statute of Limitations

Resolution 74067, which contains the findings of fact upon which this lawsuit is premised, was passed by the Muscatine City Council on July 18, 1974. Although the initial appraisal of plaintiffs' property had been under-

taken pursuant to the urban renewal plan outlined in the resolution, the implementation thereof was suspended until November 12, 1975, at which time the Iowa Supreme Court issued a ruling upholding the City's incremental financing arrangement in the test case of Richards v. City of Muscatine, 237 N.W. 2d 48 (Iowa 1975). In light of the state court decision, the City Council voted on December 18, 1975 to proceed with the urban renewal project. It was not until December 22, 1976, however, that the actual taking of plaintiffs' property was effectuated. The Shoemakers and Papes filed their complaints in this Court on the 9th and 11th days of December, 1978, respectively.

In the Court's estimation, the

deprivation of plaintiffs' property occurred at the point of the actual taking, on December 22, 1976. Prior to that date, plaintiffs could not have sought to maintain an action for damages under section 1983, since no legally cognizable injury to plaintiffs' constitutional rights had yet been inflicted. The statutory period within which the condemnation could be attacked did not commence until December 22, 1976.

Because section 1983 does not contain express time limits within which suits arising thereunder are to be filed, the Court must review the timeliness of plaintiffs' cause by applying the most analogous Iowa statute of limitations. Board of Regents v. Tomanio, ___U.S.___, 100 S.Ct. 1790, 1795-1795 (1980); Johnson v. Railway

Express Agency, Inc., 421 U.S. 454, 462 (1975); Green v. Ten Eyck, 572 F. 2d 1233, 1237 (8th Cir. 1978). In order to do so, the Court must ascertain the underlying cause of action under state law and enforce the limitation which the state would enforce if the action had been brought in its court system. Rosales v. Lewis, 454 F. Supp. 956, 958 (S.D. Iowa 1978). This rule presents little difficulty where state law provides for a limitations period directly analogous to the federal claim; however,

> where a more attenuated analogy is required, the Court (1) may look to the nature of the defendant's conduct and apply the statute of limitations applicable to tort actions premised on similar conduct, or (2) may apply the state's limitation relating to statutorily-created liabilities. (Citations omitted).

Rosales v. Lewis, 454 F. Supp. at 958.

Defendant argues that the Iowa Tort Claims Act Chapter 613A, furnishes a closer analogy to plaintiffs' federal cause of action than the general two-year limitation period delineated in Section 614.1(2) of the Code. Bearing in mind, however, the generous nature of the relief afforded under section 1983 as well as the marked trend evident in recent Supreme Court decisions toward expansion of municipal liability in civil rights actions, the Court is persuaded that a severe circumscription of the federal remedy which would result if the brief limitation prayed for were imposed cannot be sanctioned. Accordingly, the Court finds that the most analogous Iowa Statute of Limitations is the two-

year limit on suits predicated upon injuries to persons or reputation delineated in section 614.1(2).

One of the primary purposes of section 613A.1(3) abbreviated notice and limitations components is to alert the municipality of the commission of the alleged tort, in order to permit prompt investigation. See Lunday v. Vogelmann, 213 N.W. 2d 904, 907 (Iowa 1973). Since defendant acknowledges and the facts plainly demonstrate that the City Council had ample forewarning of plaintiffs' vigorous objections to its urban renewal project and the concommitant expropriation of their property, the legislative intent underlying Section 613A.5 is not frustrated by this Court's choice of the general two-year statute of limitations. See

Rosales v. Lewis, 454 F. Supp. at 960. Moreover, where the language of Chapter 613A does not evince an overiding state interest in regulating the precise form of tortious conduct comprising the subject matter of this lawsuit, the argument for application of its limitations provision becomes less compelling. See Green v. Ten Eyck, 572 F. 2d at 1237-1238; Warren v. Norman Realty Co., 513 F. 2d 730, 734-735 (8th Cir.) cert. den., 423 U.S. 855 (1975).

Having determined that the date of the alleged wrong was December 22, 1976, and because plaintiffs filed their respective complaints within the applicable two-year time frame provided in section 614.1(2), both the Papes and Shoemakers are entitled to litigate their constitutional claims in this Court.

B. Res Judicata

With regard to defendant's argument that the Shoemaker's continued maintenance of this action is precluded by the doctrine of res judicata, the Court after a perusal of the authorities cited for this proposition finds that defendant's motion for summary judgment on this ground should be denied. Admittedly, principles of res judicata operate in section 1983 lawsuits to bar relitigation of constitutional issues actually or necessarily adjudicated in a previous lawsuit involving the same cause of action. See Allen v. McCurry, ___ U.S. ___, 101 S.Ct. 411 (1980); Robbins v. District Court of Worth County, 592 F. 2d 1015, 1017 (8th Cir. 1979).

However, the constitutional questions raised in Division IV of the Shoemaker's state law complaint were not properly before the state district court, and thus could not have been actually or necessarily disposed of in that court. Under the rationale set forth in the Order of April 25, 1980, the state court's subject matter jurisdiction was restricted pursuant to Section 472.21 of the Code to a determination of the propriety of the amount of damages assessed by the condemnation commission. State ex rel. Iowa State Highway Commission v. Read, 228 N.W. 2d 199, 203 (Iowa 1975), appeal after remand, 262 N.W. 2d 533 (197 Iowa 1978). Therefore, since the claims pending before this Court could under no circumstances have been entertained by the

state district court, the principle of res judicata does not foreclose plaintiffs' right to pursue such claims herein.

Defendant insists that its motion must be sustained as a result of plaintiffs' failure to challenge the legality of the condemning public body's actions in a separate proceeding in equity, whereby the plaintiff condemnees could have requested an injunction prohibiting the condemnor from confiscating their property. In effect, defendant is not seeking judicial application of res judicata precepts to prevent readjudication of matters which were actually or which could have been asserted on appeal of a condemnation award, but to foreclose further review of plaintiffs putative

constitutional claims because the latter did not resort to a collateral state remedy.

The foregoing argument as framed by defendant may well have prevailed on appeal to the Iowa Supreme Court of the state district court's dismissal of Division IV of the Shoemaker state complaint. Upon careful evaluation of the case, however, the Court is not persuaded that the mere existence of an available collateral remedy compels its disregard of the well-established axiom that exhaustion of state judicial or administrative avenues of relief is not a prerequisite to suit under section 1983. See Board of Regents, 100 S.Ct. at 1798-1799; Steffel v. Thompson, 415 U.S. 452, 472-473 (1974); Green v. Ten Eyck, 572 F. 2d at 1239. For as

the Supreme Court has observed:

> [I]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Monroe v. Pape, 365 U.S. 167, 183 (1961). Accordingly, the defendant's motion for summary judgment on res judicata grounds is hereby denied.

II. Motion to Strike

As to defendant's motion to strike plaintiffs' jury demand, no allegation is raised therein as to plaintiffs' noncompliance with the procedural requirements delineated in Rule 38 of the Federal Rules of Civil Procedure. Instead, defendant argues that the issues involved in this lawsuit, while legal in nature, are not triable to a jury. By way of response, plaintiffs

contend that the factual issues underlying their claims are appropriate for consideration by a jury.

Rule 38 preserves intact the Seventh Amendment right of trial by jury. Although the amendment was designed to incorporate the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common law forms of action recognized at that time. Curtis v. Loether, 415 U.S. 189, 193 (1974). Where a legislature creates an action unheard of at common law, the Seventh Amendment mandates a trial by jury if that action implicates rights and remedies traditionally enforced in an action at law. Pernell v. Southall Realty, 416 U.S. 363 (1974).

In Curtis, a statutory action

establishing a right to recover damages was deemed to have been instituted to vindicate legal rights. Of importance in ascertaining the character of a statutory action is the nearest historic analogue. See Pernell v. Southall Realty, 416 U.S. at 375-381. Ultimately, whether or not a party is entitled to a jury trial is contingent upon the legal aspects of the issues to be tried, as opposed to the character of the overall lawsuit. Ross v. Bernhard, 396 U.S. 531, 537-538 (1970).

According to defendant, the nature of the primary issue to be adjudicated herein, the validity of the City Council's decision to condemn plaintiffs' property for an ostensibly public use, militates against a grant of plaintiffs' jury demand. Albeit its

admission that plaintiffs' suit is essentially legal in nature, defendant maintains that the Council's inherently legislative determination is reviewable by the Court alone, under a deferential "arbitrary and capricious" standard.

There is no question that the compensatory relief requested under Section 1983 is analogous to that typically sought in a tort action for damages. Moreover, defendant concedes that complainants, whose cause of action is subsumed under the civil rights statutes of 1866, enjoy a general right to trial by jury of their constitutionally cognizable grievances. See Burt v. Abel, 585 F. 2d 613, 616 n.7 (4th Cir. 1978).

Thus the question becomes whether the presence of several matters to be

adjudicated by the court as a matter of law nullifies plaintiffs' jury demand. Non-legislative issues of fact which may properly be disposed of by the jury include the actual truth or falsity of factual findings upon which the city council's conclusions were based, whether such findings were made with the intent to deprive plaintiffs of their property without due process of law and whether the challenged urban renewal plan, MURP II, conformed to the comprehensive plan adopted by the City of Muscatine, as mandated by state law. The specific determinations of whether (1) the characterization of plaintiffs' property as "blighted" was arbitrary and capricious and in excess of the Council's authority under the Fifth and Fourteenth Amendments, and

(2) the confiscation of such property was effected for a private rather than a public benefit are ultimately for the Court, as are all constitutional issues. However, the Court believes that the factual questions upon which such legal determinations must rest may be joined before a jury.

In the final analysis, therefore, the Court is persuaded that defendant's motion to strike plaintiffs' jury demand must be denied. Over the years, the Supreme Court has developed a strong policy favoring jury trials, which in doubtful cases such as the one at bar warrants judicial adherence thereto. See 9 Wright and Miller, Federal Practice and Procedure, Section 2302 at 21-22 (1971) and cases cited therein. In this light, the Court must

recognize the existence of disputed factual questions which while forming a predicate for pure issues of law, may nonetheless be submitted to a jury, thereby attesting to the general propriety of plaintiffs' jury demand. Those matters of law which cannot be considered by the jury will of course be adjudged by the Court.

IT IS THEREFORE ORDERED that defendant's Motions to Strike Jury Demand and for Summary Judgment are hereby denied.

Signed this 6th day of July, 1981.

W.C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> SECTION I. All persons born, or naturalized in the United States, and subject to

the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, wthout due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code,

Section 1500(c) provides:

> No open-space land for the acquisition of which a grant has been made under this chapter of this title shall be converted to uses not originally approved by the Secretary without his prior approval. Prior approval will be granted only upon satisfactory compliance with regulations established by the Secretary. Such regulations shall require findings that (1) there is adequate assurance of the substitution of other open-space land of as nearly as feasible equivalent usefulness, location, and fair market value at the time of the conversion; (2) the conversion and substitution are needed for orderly

growth and development; and (3) the proposed uses of the converted and substituted land are in accord with the then applicable comprehensive plan for the urban area, meeting criteria established by the Secretary.

Title 42, United States Code,

Section 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Title 42, United States Code,

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42, United States Code, Section 1985 provides in pertinent part:

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;.....in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby

another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42, United States Code, Section 1986 provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power toprevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damage may be recovered in an action on the case;.....But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Title 42, United States Code, Section 5305(a)(2), which was in effect at the time of the actions complained of, said in pertinent part:

> ....In addition, an applicant may use block grant funds to acquire or construct parks, only if assistance for such parks under other federal laws or programs is determined to be unavailable.

Rule 56(e), Federal Rules of Civil Procedure, Notes of Advisory Committee on Rules, 1963 Amendment, provides in pertinent part:

> .....Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

The above APPENDIX TO PETITION FOR WRIT OF CERTIORARI respectfully submitted on this 4th day of December, 1985.

Mose Korey

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

CERTIFICATE OF SERVICE

This is to certify that the undersigned did on this 5th day of December, 1985, deposit in the U.S. Mail, postage prepaid for delivery by first class mail to the following addresses:

1. Mr. Alexander L. Stevas,
Clerk
United States Supreme
Court Building
1 First Street, N.E.
Washington, D.C. 20543

forty-three (43) copies of:

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

for filing, of which three (3) copies are to be returned to Petitioner after filing.

2. Patricia Rhodes Cepican
3432 Jersey Ridge Road
Davenport, Iowa 52803

three (3) copies of same document.

I further certify that, in compliance with Supreme Court Rule 28.5(c), all parties required to be served have been served.

Mose Korey
MOSE KOREY

Subscribed and sworn to before me on this 4th day of December, 1985.

Dawn L Helfrich
NOTARY PUBLIC